In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
DECISION OF THE COURT BELOW.

The decision of the Circuit Court of Appeals is reported in 130 Fed. (2d) 624 and is printed in the record herewith at pages 2069-2085.

II.

JURISDICTION.

A statement of the basis on which this Court has jurisdiction to grant the writ is set forth at page 2 of the petition herewith.

III.

STATEMENT OF THE CASE.

For the purposes hereof petitioner relies upon and will use the statement of the case on pages 3 to 8, inclusive, of the petition herewith.

IV.

SPECIFICATION OF ERRORS.

Petitioner submits that the Circuit Court of Appeals erred in the following particulars:

1. In holding that the activities of petitioner in performing its limited functions as a national bank are in commerce and affect commerce within the intent of Section 2 (6) and (7) of the Act.

2. In holding that particular activities of petitioner are in commerce or affect commerce under Section 2 (6) and (7) of the Act and that jurisdiction of the Board may be found from transactions which are used in and necessary for the accumulation, transfer and exchange of, and for other dealings in money.

3. In giving to Section 2 (6) and (7) of the Act an effect beyond the intent of Article I, Section 8 (3) of the Constitution by confusing matters which are merely incidental to commerce with the tangible realities and objects of commerce.

4. In confusing money and its use as the basis of credit with commodities of commerce.

5. In holding that petitioner as a national bank is not an excepted employer under Section 2 (2) of the Act which excludes the United States as an employer and, by necessary implication, excludes its instrumentalities.

6. In denying to petitioner by its order of March 4, 1942, the appointment of a special master or other means to obtain evidence on the issue made by petitioner's special defense that the proceedings and conduct of the Board and its Trial Examiner were prejudicial and unfair and not in due process of law.

7. In failing to pass upon petitioner's motion and request for leave to introduce evidence on the issues of due process made by petitioner's special defense, and by such failure, denying to petitioner a fair and impartial hearing by said Court in due process of law.

8. In affirming the ruling of the Trial Examiner by which petitioner was denied a subpoena to compel the attendance of witnesses and the production of evidence which it deemed material to its defenses.

9. In affirming the findings and conclusions of the Board, that petitioner committed the acts inhibited by

Section 8 (1) and (3) of the Act without the support of substantial evidence.

10. In affirming the findings and conclusions of the Board, which rely for their main support on expressions of opinion not connected with the acts charged and are otherwise without the support of substantial evidence.

V.

SUMMARY OF THE ARGUMENT.

The argument will discuss the federal and procedural questions and the conflict of decisions applicable to (a) the jurisdictional issues, (b) the questions of due process, (c) whether there is evidence to support the findings. It will follow the order and substance of the Reasons for Allowance of the Writ stated in the petition herewith.

VI.

ARGUMENT.

A. THE JURISDICTIONAL QUESTIONS.

(1) The power of the Congress to regulate commerce flows from Article I, Section 8 (3) of the Constitution. The intent of Section 2 (6) and (7) of the National Labor Relations Act is limited by the intent of the Constitution. Petitioner is a national banking association and its powers flow from and are limited by the National Bank Act. In granting and limiting

the corporate powers of national banks the Congress expressly defined its conception of the business of banking in the following terms:

> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title. * * *"
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> *U. S. R. S.* 5136, 12 U. S. C. A., Sec. 24.

We find light on the wording and intent of the Act in House of Representatives Report No. 1147, 74th Congress, First Session (1935). We quote from the report at page 10:

> "The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions as used in their appropriate setting in Sections 9 and 10. The bill is based squarely on the power of Congress to regulate commerce among the several states and with foreign nations. It does not apply to controversies or practices of purely local significance, which do not presently or potentially burden or obstruct the free flow of such commerce.
>
> The Committee Amendment to subsection 6 narrows the definition of interstate commerce by not making it extend to transportation or communication that is merely 'related to' interstate commerce. This change has been made in view of the

doubts that the Schechter Case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.

The new definition inserted by the Committee Amendment to subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely 'affect' interstate commerce. Under this Amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction."

In *Schechter v. United States,* 295 U. S. 495, this Court, in a unanimous opinion written by Chief Justice Hughes, said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle * * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

It is obvious that the Constitutional intent and the Congressional intent are federal questions which, in their relation to the purposes and activities of national banks, have never been fully, but ought to be decided by this Court. These questions are of great public interest and of paramount importance to all banking institutions, and to the national monetary and fiscal policies and they should be settled.

(2) In its decision the Circuit Court of Appeals finds that particular activities of petitioner are in commerce or affect commerce, and, on that assumption, that its labor relations are subject to regulation under the Act. The decision is probably in conflict with decisions of this Court which hold that activities and transactions of various kinds common to all banking are not in commerce but only incidental to commerce, e.g.:

Dealing in negotiable notes is not commerce.
Hemphill v. Orloff (1928), 277 U. S. 537.

Accepting and accumulating deposits of money for transfer to foreign countries is not commerce.
Engel v. O'Malley (1911), 219 U. S. 128.

Receiving and transmitting bills of lading with drafts for collection of money is not commerce but only incidental to commerce.
Hopkins v. U. S. (1898), 171 U. S. 578.

Buying and selling foreign-exchange is not commerce.
Nathan v. Louisiana (1850), 8 How. 73.

The supplying of credit information is not commerce.

U. S. Fidelity & Guaranty Co. v. Kentucky (1913), 231 U. S. 395.

Execution of life insurance policies, which are private contracts, as are most of the contracts used in banking, is not commerce.

New York Life Ins. Co. v. Deer Lodge County (1913), 231 U. S. 495;

New York Life Ins. Co. v. Cravens (1900), 178 U. S. 389;

Paul v. Virginia (1869), 8 Wall. 168.

The conflict requires a review of the case by this Court.

(3) In its decision that the activities of petitioner as a national bank may be regulated under the commerce powers the Circuit Court of Appeals has decided an important question of federal law which is probably in conflict with applicable decisions of this Court which hold that the power to create and regulate national banks is contained in Article I, Section 8 (18) of the Constitution.

The power to create national banks and to confer upon them special privileges and immunities was bitterly contested by the states. This Court found the power to create such banks in Article I, Section 8 (18) of the Constitution. Under the powers therein found this Court held that the Congress could create such banks to aid other important needs and objects of the Federal Government. Up to this time there has been

no decision holding that any power of creation or regulation exists under the commerce clause.

Farmers' and Mechanics' Nat. Bank v. Dearing (1875), 91 U. S. 29;
Osborn v. Bank (1824), 9 Wheat. 738;
M'Culloch v. Maryland (1819), 4 Wheat. 316.

Although larger in scope, the nature and incidents of banking have not materially changed from their character when these cases were decided. The decision of the Circuit Court of Appeals seems to overrule the logic of these decisions and the conflict requires that the case be reviewed by this Court.

(4) In holding that activities of the kind in which petitioner is engaged may be regulated under the commerce powers the Circuit Court of Appeals has decided an important question of federal law in a way which is probably in conflict with the following applicable decisions of this Court which hold that the several states may create and regulate banks under their police powers:

Noble State Bank v. Haskell (1911), 219 U. S. 104;
Shallenberger v. First State Bank (1911), 219 U. S. 114.

If the power to regulate banks exists under the commerce clause, the Congress may, at any time, assume entire control of all banking to the exclusion of the several states. The question is of the highest importance, not only to banks, but to the several states and to the people. The decision is probably in conflict with the opinion of this Court in the cited cases that the

power of the federal government and the power of the states to create and regulate banks is concurrent, but one flows from the Constitution while the other has always resided in the police powers of the several states. These considerations require that the case be reviewed by this Court.

(5) In holding that petitioner is an employer within the intent of Section 2 (2) of the Act, which excludes the United States, and, by necessary implication, excludes its instrumentalities, the Circuit Court of Appeals has decided an important question of federal law which is probably in conflict with the following applicable decisions of this Court.

Federal Land Bank v. Bismarck Lumber Co. (1941), 314 U. S. 95;

First Nat'l. Bank of San Jose v. California (1922), 262 U. S. 366;

Easton v. Iowa (1903), 188 U. S. 220;

Farmers' and Mechanics' Nat'l. Bank v. Dearing (1875), 91 U. S. 29;

Osborn v. Bank (1824), 9 Wheat. 738;

McCulloch v. Maryland (1819), 4 Wheat. 316.

Other decisions of this Court are to the same effect but these cases are leading and persuasive.

In *Easton v. Iowa* (1903), 188 U. S. 220, this Court said:

> "* * * Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations;"

The Act under which national banks are organized constitutes a complete system for their government. *Cook County Nat. Bank v. U. S.* (1882), 107 U. S. 445. Nothing in the National Labor Relations Act refers to or attempts to regulate national banks under the commerce powers. In considering the objectives of the National Bank Act and of the National Labor Relations Act, it is a reasonable assumption, justified by the decisions of this Court, that when the Congress excluded the United States as an employer under the Act it meant to exclude an instrumentality of such character as a national bank. In holding the contrary, the Board, and the Circuit Court of Appeals in affirming the order, have adopted a single-minded view. On that subject this Court said in *Southern Steamship Company v. N. L. R. B.* (1942), 316 U. S. 31, 86 L. Ed. Adv. 815:

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

The conflict requires a review by this Court.

B. THE DUE PROCESS QUESTIONS.

1. The proceeding in the Circuit Court of Appeals is original and is in equity. In its answer to the petition for enforcement petitioner brought forth facts disclosed by an important public document (Proceedings and Report of Committee of the House of Representatives under House Resolution No. 258) which make a strong showing of failure of due process in the proceedings of the Board in the *Washer* case, which was consolidated with this case for hearing in the Court below. The charge of the union was on file with the Board in this case while the *Washer* case was on trial and pending before the Board. If the mind of the Board was closed, unfair and partial in one case, it was in the other. Its Trial Examiners knew and gave effect to its policies in both cases. The findings in the Report of the House of Representatives and their effect are set forth at length in petitioner's answer. (320 to 354.) The disclosures of the House Committee shock good conscience in a judicial proceeding.

The Board has not denied the disclosures of the House Committee. A copy of its Proceedings and Report was exhibited to and filed with the Court below and the Court was apprised of its contents (2059). It denied petitioner's motion for the appointment of a special master or other means to inquire judicially into the disclosures, which clearly showed a failure of due process. It expressed no opinion on the merits of the motion (2059).

The order of the Court below denying petitioner's motion is probably in conflict with the views expressed by this Court in several decisions including:

Morgan v. United States (1937), 304 U. S. 1;

Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio (1936), 301 U. S. 292;

Morgan v. United States (1935), 298 U. S. 468.

Whether the proceedings of the Board and of the Court below were in due process of law is a federal question under the Fifth Amendment of the Constitution. The case should be reviewed by this Court on that ground.

2. Before submitting its argument on the jurisdictional and factual issues of the case petitioner moved the Court below for leave to introduce evidence in support of its special defense on the issues of due process (2060-2061). The Board opposed the motion on the ground that the Order of March 4, 1942, on the motion to appoint a special master, precluded the motion for trial of these issues (2062-2066). In its decision on the merits the Court below made no reference to the motion and has made no order thereon. It is submitted that this was not due process in the Court below. It was a departure from the usual course of judicial proceedings which calls upon this Court to exercise its power of supervision.

Ford Motor Co. v. N. L. R. B. (1938), 305 U. S. 364;

Consolidated Edison Co. v. N. L. R. B. (1938), 305 U. S. 197;

Cohens v. Virginia (1821), 6 Wheat. 264;
Earle v. McVeigh (1876), 91 U. S. 503.

3. In its answer to the petition for enforcement (315-316) petitioner pleaded as special defenses error and misconduct of the Trial Examiner in refusing a *subpoena duces tecum* (1307-1321); in denying petitioner's offer of proof (1318-1321), and in refusing petitioner's demand for production of written statements of complaining employees, which statements were in the Board's possession. (1318, Exception 5 to the Intermediate Report, 61.)

Section 6(a) of the Act provides as follows:

> "The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe."

Section 21 of the Rules and Regulations of the Board provides for the attendance of witnesses, the production of evidence, and the issuance of subpoenas, as follows:

> "Any member of the Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents that relate to any matter under investigation or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Applications for subpenas may be filed by any party prior to the hearing with the Regional Di-

rector. The Regional Director may grant or deny the application, or may refer it to the Trial Examiner, who may thereafter grant or deny the application. Application for subpenas made during the hearing shall be made to the Trial Examiner who may grant or deny the application. Such applications shall be timely, and shall specify the name of the witness and the nature of the facts to be proved by him, and, if calling for documents, must specify the same with such particularity as will enable them to be identified for purposes of production."

It cannot be disputed that the power of an administrative board to make rules and regulations is a power to be exercised within the limitations of the enabling law. The Act does not provide that the Board may, in its discretion, refuse a subpoena. The subpoena requested by respondent was not resisted on the ground that it was untimely. The witnesses whose presence it sought were present or immediately available and the records were in their possession or in the possession of counsel for the Board.

The provision in the Rules and Regulations of the Board requiring employers to make written application for subpoenas and to specify therein the nature of the facts to be proved, whereas, subpoenas on behalf of the complainants are issued by the Board of its own motion without application or showing, is unfair and discriminatory.

The Circuit Court of Appeals for the Seventh Circuit so held in the case of *Inland Steel Co. v. N. L.*

R. B. (1940), 109 Fed. (2d) 9. The Court said at page 18:

> "Another ground upon which petitioner argues it was deprived of a full and fair hearing is that it was denied the privilege of ordinary witness subpoenas. At the outset of the hearing, the Trial Examiner ruled that such subpoenas would be issued to petitioner only upon written application containing specifications of 'the name of the witness and the nature of the facts to be proved'. The Board takes the position that this ruling of the Examiner was in compliance with Article II, Section 21 of the Rules and Regulations of the Board. Petitioner's position is that this rule, when fairly construed, has application only to subpoenas duces tecum and not ordinary subpoenas. We do not think the rule is susceptible of such construction—in fact, it plainly reads otherwise. The Board also argues that the rule does not apply to it because it is not a party to the proceedings. We do not think it is necessary for us to determine whether or not this position is sound. The fact is, the rule was not applied to counsel for the Board and, therefore, he was not required to file such application. When petitioner raised the question early in the hearing, counsel for the Board stated: 'That the rules and regulations do not provide that the Board must apply to itself for subpoenas; that to construe the rules in that manner would be ridiculous; and that for both of those reasons the practice is that the Board does not apply to itself for subpoenas.'
>
> "Assuming that counsel for the Board correctly appraised the situation, and we think it did, it

discloses the unfairness of the procedure employed. It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule, does not improve the situation—it merely shows the rule itself is unfair and discriminatory."

* * * * * * *

"It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner, under Section 10(e) of the Act, has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena."

The rule of the Board for the issuance of subpoenas is in itself discriminatory. Its application in this case was a denial of due process and equal opportunity under the law. By it petitioner was denied the right

to offer the evidence and to argue its materiality before the Trial Examiner. The question of materiality was determined by the denial of the subpoena without a hearing. We have here not only a discriminatory rule but a discriminatory application of the rule.

The vice in the Trial Examiner's ruling on the application for the subpoena extends also to his refusal of the offer of proof and to the demand of petitioner for production of the written statements of the complaining employees. It was equivalent to a refusal to permit petitioner to produce evidence which might be material to its defense. If the evidence, when produced or offered, were found to be immaterial, the Trial Examiner could exclude it. But it was prejudicial error to refuse petitioner the opportunity of any process or means to obtain the evidence for the purpose of offering it.

The Circuit Court of Appeals affirmed the ruling of the Trial Examiner (2081). Its decision is in conflict with the decision in the Seventh Circuit. A review by this Court is required to settle the law.

C. SUFFICIENCY OF THE EVIDENCE.

1. The Board rested its finding that petitioner committed the acts inhibited by Section 8 (1) and (3) of the Act largely upon expressions of opinion and detached oral comments of other employees and officers of petitioner which only by guesswork can be con-

sidered to have had any connection with the acts charged.

Expressions of opinion upon which the Board relied to support its findings appear in the record at pages 1741, 574, 577, 547, 592-3, 769, 973, 949, 1261-2. The Court below adopted the findings of the Board (2075).

The decision is probably in conflict with the decision of this Court in *N. L. R. B. v. Virginia E. & P. Co.* (1941), 314 U. S. 469. A federal question arises under the First Amendment of the Constitution whether expressions of opinion on a question of such social and economic import as the unionization of bank employees may be used as evidence to convict an employer of unfair labor practices unless the opinions expressed were clearly connected with the acts charged. The question requires mature consideration and a review by the Court.

2. The Board looked for support of its findings to expressions of opinion of Thomas McCullough in a conversation with Angela Gizzi Ward, a witness for the Board. (Board Findings, p. 169; testimony of Angela Gizzi Ward at pages 1261-1262.) She testified as follows:

> "Mr. McCullough made the statement that in his opinion the Union made a great mistake when it went C I O and then stated that the C I O would not get anywhere because there were too many Communists in the C I O, too many radicals." (1261.)

The evidence discloses (1262) that the witness and McCullough were having a social conversation. His statement was detached and had nothing to do with the discharge of ten messengers.

R. A. Schacht was a clerk in charge of about fifteen bookkeepers at one of petitioner's branches (590). The bookkeepers took steps to join a union and then withdrew after talking to Schacht who told them that in his opinion unionization of bank employees would stagnate their positions and salaries (592-593).

There is no evidence that Schacht had any authority to speak for petitioner, nor anything more than that his views were his own, or that he knew about the ten messengers, or that in point of time and place, his opinions had anything to do with their discharge.

The Court below accepted the view of the Board that what Schacht said supported the findings. But the extent and degree in which the findings rely on such detached and off-hand opinions as we have quoted, and on other facts and circumstances, are not disclosed by the Board's decision.

The finding which depends for support on expressions of opinion, most of which appear to be innocent and detached, is subject to the vice which this Court found in *N. L. R. B. v. Virginia E. & P. Co.* (1941), 314 U. S. 469. The decisions are probably in conflict and the case should be reviewed by this Court.

It is respectfully submitted that the petition should be granted.

Dated, San Francisco, California,
February 17, 1943.

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